No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

U.S. FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR EVANGELICAL ENVIRONMENTAL NETWORK, *ET AL.* AS AMICI CURIAE SUPPORTING RESPONDENTS

IAN WEINSTEIN
Counsel of Record
BRONWYN ROANTREE
MICHAEL W. MARTIN
LINCOLN SQ. LEG. SERV., INC.
FORDHAM LAW SCHOOL

150 West 62nd Street
New York, NY 10023
(212) 636-6934
Counsel for Amici
iweinstein@law.fordham.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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BRIEF FOR EVANGELICAL ENVIRONMENTAL NETWORK, *ET AL.* AS AMICI CURIAE SUPPORTING RESPONDENTS

Amici are a group of religious organizations, and respectfully submit this brief in support of respondents Center for Biological Diversity, Gulf Restoration Network, and the U.S. Fish and Wildlife Service, *et al.*

INTEREST OF AMICI CURIAE[1]

Amici are a diverse set of five faith-based groups, pursuing their respective faiths alongside each other and recognizing a shared commitment, rooted in religious teachings and principles, to care for the earth and its species. Amici have a wide array of beliefs and come from different faith traditions, yet they unite here to speak with one voice in urging the Court to uphold the Fifth Circuit's interpretation of the Endangered Species Act.

Amici's diverse religious traditions emphasize the religious obligation of stewardship for the earth and all its creatures. Stewardship requires us to protect species against extinction and restore endangered species. Above all, stewardship calls us to ensure that what was passed on to us will be passed on to future generations. Extinction is a distinctly devastating harm to

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

the environment because it cannot be undone. It is also a dereliction of the duty of stewardship. Amici submit this brief to underscore the moral and practical importance of preventing species extinction and restoring endangered species. Congress well appreciated the magnitude of the harm when it drafted the Endangered Species Act. Petitioner would weaken the Act and diminish our legal obligation to ward against such tragedy. Its claim should be rejected.

Amici are as follows:

Evangelical Environmental Network (EEN), a 501(c)3 nonprofit organization founded in 1993, is a ministry that educates, inspires, and mobilizes Christians in their effort to care for God's creation, to be faithful stewards of God's provision, to get involved in regions of the United States and the world impacted by pollution, and to advocate for actions and policies that honor God and protect the environment. The EEN publishes materials to equip and inspire individuals, families, and churches; and seeks to educate and mobilize Christians to make a difference in their churches and communities, and to speak out on national and international policies that affect our ability to preach the Gospel, protect life, and care for God's creation.

National Council of Churches USA (NCC), a 501(c)3 nonprofit organization, is the principal ecumenical organization in the United States with 35 Protestant, Orthodox, and Anglican member denominations with a combined membership of more than 45 million Christians in nearly 100,000 congregations

from Protestant, Anglican, Orthodox, Evangelical, historic African American and Living Peace traditions nationwide. The NCC has considered the moral implications presented by environmental issues through the lens of long-standing social teaching and have adopted numerous policy statements calling for a response to these threats to God's creation. Since 1950, the NCC has served as a leading voice of witness to the living Christ.

Coalition on the Environment and Jewish Life (COEJL) is an initiative of the Jewish Council for Public Affairs, a 501(c)3 nonprofit organization. The Jewish Council for Public Affairs is the public affairs arm of the organized Jewish community and serves as the advisory body for the 16 national and 125 local Jewish community relations organizations. The COEJL deepens and broadens the Jewish community's commitment to stewardship and protection of the Earth through outreach, activism and Jewish learning. Today, COEJL's priorities are to mobilize the Jewish community to address the environmental issues through advocacy for appropriate legislation as well as action. COEJL challenges and supports Jewish organizations to pursue sustainability in their facilities, operations and programs in order to protect the earth for future generations.

Franciscan Action Network (FAN), a 501(c)3 nonprofit organization, was founded in 2007 as a collective Franciscan voice seeking to transform United States public policy related to peace making, care for

creation, poverty, and human rights. The FAN sees the interconnectedness of all creation and the common origin of humanity as rooted in God's loving design for the earth and all people. Recognizing this fundamental goodness of God through the act of creation, FAN counters the social sinfulness that persistently compromises God's hopes, through a clarion call to conversion. It is through continual conversion that the cry of the earth and the cry of the poor can be heard in their authenticity and understood in a way that leads us to rediscover our original goodness, both personally and collectively.

Reconstructionist Rabbinical Association, a 501(c)3 organization, serves as the collective voice of Reconstructionist rabbis, the rabbinic voice of the Reconstructionist Movement and as a Jewish voice in world affairs. Based upon our deep engagement with Jewish traditions, texts and teaching and in concert with our highest held values and aspirations, it is incumbent upon us to be present in the world's market place of ideas and viewpoints. The Reconstructionist Rabbinical Association is keenly aware of the environmental crisis we face, and acknowledges the supreme Jewish value to guard and protect the environment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks: How hard must we try to prevent species extinction? Amici, who represent a variety of faiths, urge that both our faith traditions and the law require us to try quite hard. Amici believe we are called by God to fulfill a duty of stewardship to care for the earth. The extinction of a species, the permanent and irreversible loss of one of God's creatures, breaches that duty of stewardship. The dusky gopher frog, which once lived across wide swaths of America's south, is now at serious risk of extinction. The future of that species, and others, is at stake in this case.

The Endangered Species Act of 1973 reflects amici's deeply rooted conviction that the loss of a species is a grave harm. This Court has noted that Congress viewed species loss as demanding special attention in *Tennessee Valley Authority v. Hill*, noting, "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." 437 U.S. 153, 184 (1978).

In view of the stakes, both moral and practical, we are obligated by both faith and the Endangered Species Act to conserve the habitat of endangered species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3). The designation of critical habitat is among the most important conservation tools within the Endangered Species Act. The law grants

substantial authority to the Fish and Wildlife Service in designating critical habitat because of the gravity of the harm it seeks to avoid. The Fish and Wildlife Service is well within its statutory authority in its efforts to preserve and restore the dusky gopher frog, but those efforts are threatened by avarice.

Amici's faiths teach that the duty of stewardship requires responsible administration of the bounty of the earth because all living things are God's creation and have inherent value. We are called to preserve the earth for future generations. Our duty includes both caring for the earth as we find it and actively repairing damage we, or others, have done to the natural world. The conservation of critical habitat, central to amici's duty of stewardship, is likewise at the heart of the Endangered Species Act. *See* 16 U.S.C. § 1532(5).

Preserving and restoring species is quite challenging. It requires us to think in the long term and to conserve not just individual species, but also the critical habitats which they need to survive. *See* 16 U.S.C. § 1533(5) (defining "critical habitat"). Petitioner focuses on the short term. Its crabbed interpretation of the Endangered Species Act's critical habitat provisions would distort the plain text of the statute and would undermine its purpose. Given time, nature can heal. Keeping in view both the needs of the present and the demands of the future, our faiths teach us not to shirk our sacred duty, though fulfilling that duty may demand much of us.

Amici strive to create a common good, allowing us to build a beloved community in which we each stand in right relationship with God, our fellow persons, and the natural world. While economic vitality is a component of communities, it should not be mistaken for the full measure of the good. Petitioner would treat economics as the key metric and reduce other important values to ancillary concerns. The Endangered Species Act reflects the proper understanding that economic considerations be taken into account and balanced alongside other relevant but not directly comparable interests. *See* 16 U.S.C. § 1533(4)(b)(2).

Responsible long-term management of the earth and its resources is not only a central tenet of amici's religious traditions, it is also the animating principle of the Endangered Species Act. In recognition of both the teachings of our faiths and the legal requirements of the Act, amici respectfully urge this Court to uphold the Fifth Circuit's decision.

ARGUMENT

As faith groups, amici believe we have a duty of stewardship over the earth and all God's creatures, including the dusky gopher frog. The duty of stewardship requires us to protect vulnerable species from extinction. We are called to do so because all species have inherent value as a part of God's creation and because we have a responsibility to manage that creation responsibly for the good of future generations. Where the

earth has been harmed because of our mismanagement, stewardship imposes on us a further duty to repair that harm. The Endangered Species Act (ESA) mirrors the ethic of stewardship, demanding that we not only take strong measures to prevent species extinction because it is a grave and irremediable harm, but also that we work proactively to conserve species and ensure their survival.

Further, amici's faiths teach us that the pursuit of the common good mandates that we not use "with impunity the different categories of being, whether living or inanimate." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* no. 466 (2005). Rather, we must engage with the earth responsibly, ever mindful of advancing the common good. The ESA similarly recognizes that, when designating critical habitat, the Secretary of the Interior must find some balance among various, incommensurable goods, including economics. But even where the statute allows consideration of economic factors, it emphasizes that economic impacts are neither the sole nor the chief consideration. Our reason and our faiths teach us that preventing species extinction is of great value in the political and economic as well as the moral and spiritual realms.

Amici respectfully urge this Court to affirm the judgment below and permit the ESA to continue to vindicate our legal and moral duties to care for the earth and its creatures.

I. The Endangered Species Act reflects the religious obligation of stewardship incumbent on all persons of faith.

Amici's religious traditions teach that the natural world has intrinsic worth, because it is God's creation. For Jews and Christians, stewardship is rooted in the creation story of Genesis: "The Lord God took the man and put him in the Garden of Eden to work it and take care of it." *Genesis* 2:15. God delights in creation as the ultimate expression of God's creative will. *See id.* 1:31 ("God saw all that He had made, and it was very good."); *see also Psalms* 19:1 ("The heavens declare the glory of God, and the sky above proclaims his handiwork.").

In recognition of the value of creation, God entrusted stewardship over the natural world to human beings. Stewardship calls us to manage the earth responsibly, advancing the interests of humankind while respecting the inherent value of creation. The religious duty of stewardship is the moral undergirding of the ESA's mandate to protect vulnerable species from extinction.

Even as we are charged as stewards of God's creation, Deuteronomy reminds us that the world belongs to God, and not to people: "To the Lord your God belong the heavens, even the highest heavens, the earth and everything in it." *Deuteronomy* 10:14. While human beings should enjoy the bounty of the earth and satisfy our needs, we must do so in a way compatible with our duty of stewardship, respecting the intrinsic value of

creation. In this way, the good steward fulfills God's will that "man should communicate with nature as an intelligent and noble 'master' and 'guardian,' and not as a heedless 'exploiter' and 'destroyer.'" Pope John Paul II, *Redemptor Hominis* 15 (1979); *see also* Pope Benedict XVI, *Caritas in Veritate* no. 50 (2009).

Three premises animate the duty of stewardship across religious traditions: (1) stewardship recognizes that the earth has inherent value and is itself an expression of God's creative will; (2) stewardship requires that we care for the earth for the good of future generations; and (3) stewardship calls us to not only prevent future harm to the earth and its creatures, but also to repair what damage has already been done. These same commitments characterize the good administrator envisioned in the ESA. The duties of stewardship thus closely align with the Fish and Wildlife Service's duties under the ESA, supporting the judgment of the court below.

A. Stewardship requires that the earth be managed responsibly because all species have inherent value as part of God's creation.

Amici's religious traditions teach us that good stewardship requires us to manage the earth responsibly because creation is valuable in and of itself as an expression of God's creative will. Thomas Aquinas observes in his *Summa Theologiae* that the very diversity of life manifests God's glory. Because the divine

goodness could not be represented by one creature alone, Aquinas tells us that God "produced many and diverse creatures, so that what was wanting to one in representation of the divine goodness might be supplied by another . . . hence the whole universe together participates in the divine goodness more perfectly, and represents it better than any single creature whatever." Thomas Aquinas, *Summa Theologiae*, I.47.1.

The diversity of creation reflects God's glory, and a steward has no right to diminish this glory through callous mismanagement: "Because of us, thousands of species will no longer give glory to God by their very existence, nor convey their message to us. We have no such right." Pope Francis, *Laudato Si'* 33 (2015). Not only does all life have inherent value, but we also know the practical importance of biodiversity. Stewardship requires us to protect the earth in recognition of the value of the natural world in and of itself.

The Talmud likewise acknowledges the irreducible value of every species, observing that, "Everything that the Holy One, Blessed be He, created in His world, He did not create anything for naught." Babylonian Talmud, *Shabbat*, 77b. In his authoritative *Guide to the Perplexed*, Jewish philosopher Maimonides observes that, "It should not be believed that all the beings exist for the sake of the existence of humanity. On the contrary, all the other beings too have been intended for their own sakes, and not for the sake of something else." Maimonides, *Guide to the Perplexed*, III:13. That all God's creatures have an irreducible value is expressed in the Talmud, which teaches us

that "*Adam* (the human) was created on the eve of the Sabbath (i.e., last). And why (what can we learn from the order of Creation)? So that if he becomes too haughty, he can be told: the gnat preceded you in the order of Creation." Babylonian Talmud, *Sanhedrin* 38a.

Because all creatures have irreducible value, the duty of stewardship charges us with protecting them all. This sacred duty is enshrined in the covenant God made not only with Noah, but with all the creatures of the earth, following the Flood: "I now establish my covenant with you and with your descendants after you and with every living creature that was with you – the birds, the livestock and all the wild animals, all those that came out of the ark with you – every living creature on earth." *Genesis* 9:9–11. God's covenant with all living beings – not just human beings – obligates us to care for all species.

The ESA envisions an administrator who fulfills the duty of stewardship by recognizing the inherent value of all species. The text of the ESA clearly announces the Act's purpose: "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). In carrying out this broad purpose, the ESA endows the administrators at the Fish and Wildlife Service with a broad mandate, providing for the "use of all methods and procedures which are necessary to bring any endangered species

or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

Beyond the plain text of the statute, the intent of the ESA as a legislative bulwark against the extinction of species has long been recognized by this Court. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). Indeed, where critical habitat is necessary to prevent the extinction of a species, critical habitat designation is mandatory:

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, *unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

The statute explicitly delegates broad discretion to the Secretary of the Interior to designate critical habitat. *See* 16 U.S.C. §§ 1533, 1540(f). This Court has recognized and affirmed the Secretary's authority to so designate free of the interference of the courts: "When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his." *Babbit v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 708 (1995). Amici respectfully submit that in this case, the

United States Court of Appeals for the Fifth Circuit recognized that the Fish and Wildlife Service acted not only well within its statutory authority, but also in so acting, fulfilled its responsibilities to act as a responsible administrator in compliance with the duty of stewardship.

B. Stewardship requires people of faith to manage the earth responsibly as the patrimony of future generations.

Stewardship calls us to be mindful of both the needs of today and the needs of future generations. As Jesus teaches in the Gospel of Luke, God will call those entrusted with stewardship to account for how we managed creation. *See Luke* 16:2 ("There was a rich man whose manager was accused of wasting his possessions. So he called him in and asked him, 'What is this I hear about you? Give an account of your management, because you cannot be manager any longer.'"). Careful and just management is essential to ensure the patrimony of creation is passed to future generations. *See* Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* 466 (2005) ("Responsibility for the environment, the common heritage of mankind, extends not only to present needs but also to those of the future."); *see also* United States Catholic Conference, *Renewing the Earth: An Invitation to Reflection and Action on Environment in Light of Catholic Social Teaching* (Nov. 14, 1991) ("At the heart of the Christian life lies the love of neighbor. The ecological crisis, as Pope John Paul II has urged,

challenges us to extend our love to future generations and to the flourishing of all earth's creatures.").

Our faith traditions teach us that the resources of the earth are not unlimited. For example, just as God ordains a day of rest every seven days for human beings through *Shabbat*, so too God ordains a year of rest every seventh year for the land through *Shemita*. *See Exodus* 23:10–11 ("For six years you are to sow your fields and harvest the crops, but during the seventh year let the land lie unplowed and unused."). Prudence dictates that we must sometimes moderate immediate gain to ensure the long-term health of our planet. The ESA reflects the recognition that the resources of the natural world are limited, and that the bounty that had sustained thousands of generations could be catastrophically depleted by just a few technologically advanced generations.

The most serious result of mismanagement is extinction, the complete and permanent loss of a species. The administrator who permits the loss of the dusky gopher frog, or any other animal God has created for us, has failed to fulfill his or her duty of stewardship. God has entrusted us to care for the earth for the benefit of future generations. Species loss is a violation of our duty as God's trustee for the benefit of those who will come after us.

The ESA was intended to prevent us from breaching our duty to leave the world no worse than we found it. The legislative history of the ESA reflects this commitment. The Chair of the U.S. House Committee on

Merchant Marine and Fisheries analogized our responsibility to care for the earth to that of custodians of a building in which was gathered one copy of every book ever written:

> [O]ur choice is between exercising our responsibilities and ignoring them. If these theoretical custodians were to allow a madman to enter, build a bonfire, and throw in at random any volume he selected, one might with justification suggest that other [custodians] be found, or at least that they be censored and told to be more careful in the future. So it is with mankind. Like it or not, we are our brothers' keepers, and we are also keepers of the rest of the house.

H.R. Rep. No. 93–412, at 3–4 (1973).

Both responsible stewardship and responsible administration require us to work to prevent species' extinction not only for the good of the present, but also for the good of future generations.

C. Stewardship requires us to repair the earth where it has been harmed by human activity.

Stewardship requires not only responsibly managing existing resources, but also actively participating in the repair and restoration of a natural order harmed by human activity. This responsibility is clearly expressed in the Jewish principle of *tikkun 'olam*, whereby the humans undertaking the duty of stewardship over

God's creation are called upon to continuously strive to repair that which is damaged in the world. The duty to repair is lyrically expressed in a classic rabbinic midrash on *Genesis* 1:26: "When God created Adam he led him past all the trees in the Garden of Eden and told him 'See how beautiful and excellent are all my works. Beware lest you spoil and ruin My world. For if you spoil it, there is nobody to repair it after you.'" *Kohelet Rabbah* 7:13.

The duty to protect – and, where necessary, to repair – thus falls squarely on the shoulders of human beings. As Archbishop of Canterbury Rowan Williams observed, "in a world where exploitative and aggressive behavior is commonplace, one of the 'providential' tasks of human beings must be to limit damage and to secure space for the natural order to exist unharmed." Rowan Williams, *Renewing the Face of the Earth: Human Responsibility and the Environment*, Ebor Lecture, York Minster (March 25, 2009).

The act of creation is ongoing, as reflected in God's pronouncement that at the end of the six days of Creation the world was "very good," which is qualitatively different than "holy" or "perfect." *See Genesis* 1:31. The holy and the perfect remain as ideals towards which the natural world and all its creatures strive. The Christian, under his or her duty of stewardship, likewise recognizes that God's will redeems both people and nature in the new heaven and earth. Knowing this, Christians are called to be active participants in redeeming nature here and now as an expression of their

own redemption and the "living out" of their faith. *See Philippians* 2:12–13; *James* 2:14–25.

The ethic of restoration runs throughout the ESA, and is most plainly expressed in the Act's provisions for the designation of land not presently occupied by the species in question as critical habitat. The Act is committed to ensuring the survival and promoting the recovery of threatened species. Species recovery is at the heart of the ESA, and the conservation of critical habitat is a key mechanism of species recovery.

Conservation may require the preservation of habitat in which the species currently lives ("occupied" critical habitat), as well as preservation of habitat in which the species does not currently live ("unoccupied" critical habitat). *See* 16 U.S.C. § 1532(5)(A)(ii). The ESA does not draw an evaluative distinction between occupied and unoccupied critical habitat: the statute requires the protection of one or both types of habitat where necessary to meet the statute's conservation mandate. The Act requires us to take a long-term view. Species recovery requires a sustained and strong commitment.

Courts have recognized Congress' intent that the ESA have two distinct, though complementary goals: conservation and survival. The purpose of establishing "critical habitat" is to protect territory necessary not only for the species' survival, but also for its recovery. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (referencing 16 U.S.C. § 1533(f)(1): "The Secretary shall develop

and implement plans . . . for the conservation and survival of endangered species and threatened species."). Petitioner's narrow reading of "critical habitat" as limited to land where the species could presently thrive is not only patently inconsistent with the text and the purpose of the ESA, but also contradicts the Circuit court's well-established interpretation of the Act.

II. The Endangered Species Act reflects the religious conviction that pursuit of the common good, covenantal community, and right relationships prevents us from using God's creation simply as one wishes for one's own economic gain.

Economic interests do not define the common good or right relationships. Rather, we are called to seek the general welfare for all. Catholic thought develops this idea as the common good. Many Protestants understand this same idea as the seeking of right relationships – with each other, with God and with God's creation. In Jewish thought, it is understood in the centrality of the covenantal community.

These teachings require us to prioritize community, relationship, and the realization that we do not exist for ourselves alone. We recognize that the good of the community is not found solely in economic considerations. It is the aggregate of the good of individual persons living not as individuals, but in an interdependent web of community. Though it may be tempting

to reduce the complex problem of endangered species to a single dimension, like wealth maximization, doing so prevents us from striving for the common good and right relationships that are at the heart of a healthy and vibrant community.

Petitioner would unsettle the law by giving special weight to just one dimension of the costs and benefits of critical habitat designation: namely, profit maximization. Cloaking a significant change in the language of administrative procedure, the claim that judicial review should be expanded to give special weight to one kind of economic impact is both contrary to law and flies in the face of widely shared American norms.

The ESA mirrors our faith-based commitments to the common good, right relationships and the covenantal community. The Secretary of the Interior is vested, by Congress, with the responsibility and authority, when designating critical habitat, to chart a course among complex webs of social goods. The Secretary is well-positioned to study the situation over time, balance the needs of the present against our duties to the future, and make the judgments required to find a right mix of social goods to meet our moral and legal obligations. A rule can tell us what to do when a single fundamental value is violated, but a rule is less useful when we are called to balance incommensurable goods.

Importantly, precedent also commits this decision to the Secretary and should control this case. *See Sweet Home*, 515 U.S. at 708 (noting that in the ESA, Congress has granted the Secretary broad administrative

and interpretive discretion). We thus respectfully urge this Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

A. Religious teachings instruct us that human flourishing requires considering and weighing competing goods.

Amici's faiths teach us that economic interests alone do not define or exhaust the common good or right relationships. Pursuit of the common good requires us to think about and weigh practical, spiritual, moral, aesthetic and other concerns. Balancing these concerns is a challenge because the interests are often incommensurate with one another. Lacking a common axis along which these goods can be compared, discerning the proper place of each consideration in a given context is a human judgment and a moral act. It does not answer to the application of a rule or a process that can be stated with precision. Teachings on the common good, right relationships and the covenantal community remind us that no particular good – whether economic, social, or political – is coterminous with the common good. No single virtue or goal can dominate to the exclusion of others. Rather, disparate goods must be brought into harmony with one another.

In the Catholic tradition, the common good is defined as "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment." Pope Paul VI, *Gaudium et Spes* I.2.26 (1965).

Recalling the image of the Church as the Body of Christ, just as injury to one part of the body injures the whole body, so too injury to one person in the society or one constituent element of the whole injures the whole society. *See 1 Corinthians* 12:12–26.

Thus, the common good is neither simply the aggregate of the private goods of the individuals in the society, nor is it merely the good proper to the whole, but rather is "common *to the whole and to the parts*." Jacques Maritain, *The Rights of Man and Natural Law* 7 (1944). Our faiths teach us to seek the common good. For a political community, the common good is embodied in the law. Thomas Aquinas, *Summa Theologiae*, I.90.4 ("[Law] is . . . an ordinance of reason for the common good, made by him who has care of the community and promulgated [by him]."). In making and interpreting law, legislators and jurists are thus instrumental in bringing the common good into being for the political community.

The Protestant tenet of right relationships likewise recognizes that justice lies at the core of vibrant communities. It requires "creating right relationships, both social and ecological, to ensure for all members of the Earth community the conditions required for their flourishing." Nat'l Council of Churches, *God's Earth is Sacred: An Open Letter to Church and Society in the United States* (Feb. 14, 2005).

The principle of right relationships charges us to engage in the difficult work of standing in honest and just relations with God, our fellow human beings, and

creation. It recognizes the challenge of creating these relationships amid competing concerns. As acclaimed American theologian Reinhold Niebuhr wrote, value is inescapably relational: "[V]alue is the good-for-ness of being for being in their reciprocity, their animosity, and their mutual aid . . . everything has value, positive or negative, in its relations." Reinhold Niebuhr, *Radical Monotheism and Western Culture – With Supplementary Essays* 107 (1943).

Thus, at its heart, maintaining right relationships is an acknowledgement of our deep interconnectedness with both the divine and the natural world. In the words of the Archbishop of Canterbury, Rowan Williams:

> Renewing the face of the earth, then, is an enterprise not of imposing some private human vision on a passive nature but of living in such a way as to bring more clearly to light the interconnectedness of all things and their dependence on what we cannot fully master or understand.

Rowan Williams, *Renewing the Face of the Earth: Human Responsibility and the Environment*, Ebor Lecture, York Minster (March 25, 2009).

The idea of right relationships likewise resonates with the Jewish idea of the covenantal community. God's covenant with the Jewish people is not based on individual commitments, but rather with the Jewish community as a whole. *See Talmud, Rosh Hashanah* 17b–18a. A person's relationship with God exists within

his or her relationship with the community, such that each person must attend to both his or her personal welfare and the welfare of the community as a whole. The Talmudic sage Hillel expresses this balancing in his famous question: "If I am not for myself, who is for me? And when I am for myself, what am I?" Pirkei Avot 1:14.

Indeed, Maimonides teaches us that the pursuit of the good life requires us to balance sometimes conflicting impulses. *See* Maimonides, *De'Ot* 4 ("If a man will always carefully discriminate as regards his actions, directing them to the medium course, he will reach the highest degree of perfection possible to a human being, thereby approaching God, and sharing in His happiness."). Though striking the right balance is no easy feat, the Jewish tradition teaches us that only by so doing can we reach our full potential both as individuals and as a community.

Though the Catholic, Protestant, and Jewish traditions elaborate the idea differently, each tradition recognizes that we are called to seek a kind of human flourishing that is not reducible to a single good. We are taught to make a conscious effort to seek the good life. We know that privileging one good to the exclusion of others does real violence to human flourishing and impedes the faithful person's efforts to stand in right relation with God.

B. The text and purpose of the ESA require that economic considerations be considered alongside and balanced with other goods in designating critical habitat.

Just as our faiths teach us that pursuing the good life requires choosing among and balancing competing goods, so too does the ESA. And just as our traditions warn us that financial success is not the only good, so too does the ESA. The Act recognizes that the irresponsible pursuit of economic growth has been a driving force of species' extinction: "various species of fish, wildlife, and plants in the United States have been rendered extinct as a *consequence* of economic growth and development." 16 U.S.C. § 1531(a)(1) (emphasis added). At the same time, the Act recognizes that economic considerations are relevant and should be considered by the Secretary. As such, even where the statute calls attention to economic considerations, it recognizes their complexity.

The drafters of the ESA recognized that species extinction not only has an economic dimension, but also raises important ethical, aesthetic, educational, scientific and economic considerations. *See* 122 Cong. Rec. 3259 (1976), *reprinted in* Comm. on Env't & Pub. Works, 97th Cong., *A Legislative History of the Endangered Species Act of 1973*, as Amended in 1976, 1977, 1978, 1979, and 1980, at 554. Indeed, the Act begins with the finding that endangered and threatened species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3).

Consistent with the Act as a whole, the statutory authority to designate critical habitat reflects these same concerns and carefully directs attention to particular goods in particular sections. The statute requires that the designation of critical habitat focus first on the facts. It states: "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(4)(b)(2). The statute, having found in its opening section that economic factors are a driver of species loss, recognizes that economic impact be considered, but requires that it be weighed against other interests also discussed in earlier provisions.

Petitioner's contentions about the reviewability of economic determinations seek a significant departure from settled law, but amici leave that argument to the merits brief. Here, we note that once the door is opened to a special focus on economics, through that door strides the claim that designating Unit 1 as a critical habitat was inappropriate because it provides "no benefits" for the frog but instead imposes substantial financial burdens on Petitioner.

This argument misreads the record on costs and ignores the significance of habitat preservation in the work of species recovery. More fundamentally, the Petitioner's rhetoric ignores the significant benefits we all gain from the habitat designation in this case.

Amici, and all people, gain by fulfilling our moral and legal duties. We gain by accepting limits as individuals to keep faith with our communities, with future generations, and with God.

The Fish and Wildlife Service's evaluation of the evidence supporting designation of Unit 1 as critical habitat was thorough. The agency's report, using the expertise of the responsible administrator, followed the statute in weighing different kinds of goods alongside one another. Weighing economic considerations is particularly challenging in the context of endangered species for, as Cass Sunstein notes, evaluating endangered species according to a strict cost/benefit analysis is not appropriate because the concern is about "genuinely irretrievable loss." Cass Sunstein, *The Cost Benefit State* 68 (2002). One cannot compare hypothetical economic loss on the one hand with the almost inevitable loss of life on the other if Unit 1 is not designated as a critical habitat. Petitioner would put a heavy thumb on the scale, overriding non-economic concerns. Allowing economic interests to override all other interests is at odds with the fundamental purpose of the statute: to prevent species' extinction. The ruling below was both right and lawful; it should be affirmed.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit decision should be affirmed.

Respectfully submitted,

IAN WEINSTEIN
Counsel of Record
BRONWYN ROANTREE
MICHAEL W. MARTIN

LINCOLN SQUARE LEGAL SERVICES, INC.
FORDHAM LAW SCHOOL
150 West 62nd Street
New York, NY 10023
(212) 636-6934
Counsel for Amici
iweinstein@law.fordham.edu

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